No. 92-1935

In The

Supreme Court of the United States

October Term, 1992

BARBARA GERRISH,

Petitioner,

vs.

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES P. HARDING
Counsel of Record
COOPERMAN, HARDING & MOORE
Attorneys for Petitioner
80-59 Lefferts Boulevard
Kew Gardens, New York 11415
(718) 805-1500

3730
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does confidentiality needed to conduct a United States Postal Inspection into allegations of violations of 42 U.S.C. § 2000(e) *et seq.* (Civil Rights Act of 1964, Title VII), require application of principles of estoppel and equitable tolling investigated, where the employer Postal Service has actual notice of the employee's allegations as a result of the investigation?

2. Does misconduct on the part of Postal Service EEO officials in refusing to hear employee's complaint of sexual harassment in violation of 42 U.S.C. § 2000(e) *et seq.* require application of principles of estoppel and equitable tolling, where the employer Postal Service asserts lack of timely filing of Postal Service EEO complaint, as required by C.F.R. § 1613.214(a)(1)(i)?

3. Does the "manifest injustice" sought to be remedied by Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure give the courts broad discretion to fashion relief where the moving party has a meritorious claim and where public policy would be offended by permitting the employer to reap the benefit of its own misconduct?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Statement of Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

A. The Facts 4

B. Prior Proceedings 10

Reasons for Granting the Writ 11

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Irwin v. Veterans Administration, 111 S. Ct. 453 (1990) 14

Johnson v. United States, 758 F. Supp. 834 (1991) 14

Contents

Page

Lopez v. Citibank N.A., 808 F.2d 905 14

New York v. Sullivan, 906 F.2d 910 (2nd Cir. 1990) 14

Statutes Cited:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000(e) et seq. .....i, 2, 7, 10, 14, 15, 16

Rules Cited:

Federal Rules of Civil Procedure:

Rule 11 8

Rule 12(b)(1) 13

Rule 12(b)(6) 10

Rule 56 13

Rule 60 4

Rule 60(b)(1) 9

Rule 60(b)(1)(a) .....i, 2, 3, 11, 15, 16

Other Authority Cited:

29 C.F.R. § 1613.214(a)(1)(i) .....i, 2, 3, 10, 14

Contents

Page

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Second Circuit Dated March 12, 1993 ..... 1a

Appendix B — Decision of the United States District Court for the Eastern District Dated August 27, 1992 ..... 5a

Appendix C — Memorandum and Order of Judge Glasser Dated November 9, 1990 ..... 11a

No.

In The

Supreme Court of the United States

October Term, 1992

BARBARA GERRISH,

Petitioner,

vs.

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari to the United Sttes Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court, Eastern District of New York, dismissing petitioner's complaint, is not reported and is dated November 9, 1990.

The opinion of the United States District Court, Eastern District of New York, denying petitioner's motion pursuant to

Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure, is not reported and is dated August 27, 1992.

The opinion of the United States Court of Appeals for the Second Circuit affirming the decision and order of the United States District Court, Eastern District of New York of August 27, 1992, is not reported and is dated March 12, 1993.

STATEMENT OF JURISDICTION

The decision and order of the United States Court of Appeals for the Second Circuit was entered on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000(e) *et seq.*;

Federal Rules of Civil Procedure, Rule 60;

Code of Federal Regulations, § 1613.214(a)(1)(i).

STATEMENT OF THE CASE

This case focuses on whether or not relief ought to be available to an employee who has suffered and sustained sexual harassment at the hands of the employer, resulting in severe mental depression, which loss rendered the employee disabled, where the employee asserts that her late filing of a complaint of discrimination was caused by the employer itself and, where the employee was herself under a pledge of confidentiality not to disclose the information which was the suject of the investigation. It also focuses on the broad, remedial scope of Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure and the extent to which the court may exercise its discretion to prevent manifest injustice.

Petitioner, Barbara Gerrish, was a career United States Postal Service employee who was the object of intense sexual harassment by supervisors. The Postal Inspection Service investigated her allegations extensively and pledged her to confidentiality. This extended to Postal EEO officials who were, in fact, supervised by two of the subjects of the investigation. The Postal Service was clearly on notice of her claims. When Gerrish did try to file a Postal EEO complaint alleging sex discrimination, the Postal Service refused to accept it unless it was changed to mental handicap. Postal Service EEO personnel refused to investigate this case on the merits, despite the resignation and demotion and resignation, respectively, of petitioner's two main harassers in the face of the uncontroverted findings of the Postal Inspection Service. The petitioner's first District Court complaint was dismissed for failure to timely file an EEO complaint within thirty (30) days under C.F.R. § 1634, without prejudice to re-file an EEO complaint. Her second EEO complaint met with stiff resistance by the Postal Service EEO personnel, who cooperated neither with her lawyer nor with the Postal Service inspectors.

Petitioner filed a new District Court complaint in January of 1990 and the government made a motion to dismiss in April of 1990. Petitioner's then counsel was relieved. Petitioner had great difficulty in finding new counsel and sought court-appointed counsel. This request was denied and present counsel was in the process of being retained in November of 1990, when he missed a status conference on November 9, 1990 and the District Court granted the government's motion to dismiss, ruling on the merits. Present counsel filed a motion pursuant to Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure, asserting mistake and the issues of EEO misconduct, Postal Service confidentiality and the continuing severe mental disability of petitioner as reasons for relieving her from the effects of the judgment. This was supported by matters not before the court previously, including declarations from the Postal Inspection Service regarding EEO lack of

cooperation, misconduct and the entire issue of confidentiality. At no time has the government asserted, because it cannot, that there is a real defense on the merits of this case.

On August 27, 1992, the District Court denied the motion pursuant to Rule 60 and, on March 12, 1993, the United States Court of Appeals for the Second Circuit affirmed that decision.

A. The Facts

The petitioner was an employee of the United States Postal Service. She was the victim of an unabated campaign of sexual discrimination, both *quid pro quo* and abusive environment, as well as the victim of misconduct by Postal Service EEO officials who did everything in their power to frustrate and delay the pursuit and filing of her claim.

Petitioner began work for the United States Postal Service on August 27, 1966. Her career was marked by steady advancement in rank and responsibility. She received community service awards, donated her own time to Postal Service community relations programs and received superior evaluations. At the time that the acts complained of began, she was in charge of the entire Postal Service vehicle fleet for the post offices for Jamaica, Hempstead, Flushing, Long Island City and fifty (50) outlying post offices extending to the tip of the North Fork of Long Island — an area serving well over two (2) million people. She was on course for further promotion and had no history of any disciplinary infractions. She was a model employee.

All of this began to change on August 19, 1979. On that date one Walter Shanley, the Manager/Postmaster of Brooklyn, Queens and Western Nassau made an unwelcome sexual advance to petitioner following an award dinner. She immediately rebuffed him. On November 5, 1979, because of the August 19,1979 incident, she refused to attend an installation at which Stanley was

present and he excluded from publication in a local paper a photograph of petitioner together with a replica of the first post office on Long Island, a model which she had made entirely by hand.

In December, 1979 petitioner was, without advance warning, removed from her private office at the Flushing Post Office, placed in office space with subordinate employees. However, her telephone was kept in her old office, a distance equivalent to nearly a block away. She had to go that distance every time she either received or made a phone call. She was specifically told, on the date of her removal, "pack up your stuff, Shanley wants you out." Further acts of discrimination included being passed over for promotion at Shanley's direction in May of 1980, being approved and then denied a regional supervisory job through the Long Island District Women's Program after being told that Shanley had intervened to block the promotion, being peremptorily ordered by Shanley in July of 1981, to leave a supervisor's strike contingency meeting in particularly humiliating fashion by being singled out over the public address system in a room full of supervisors and instructed by name to leave the meeting, and being denied a reward for cost effectiveness planning by Shanley.

Sexual harassment did not end with Shanley. In May of 1980, petitioner was transferred to the Great Neck, Post Office. She mistakenly confided in Postmaster Daniel McGrath regarding her problem with Shanley. McGrath himself began a series of unwelcome advances by constantly ordering petitioner to his office to do her work, insisting that he see her after hours, touching, groping, calling her into his office several times a day, ostensibly for the purpose of work but in actuality using those opportunities to make unwanted physical and verbal sexual advances toward petitioner. She refused his advances for one (1) year before she submitted to him and had sexual relations. He assured her that he could protect her from Shanley. During the course of this period of

sexual harassment her mental state began to deterioratesheshe began to become depressed, obese, fearful of other people and on one (1) occasion tried to killed herself by running into traffic. She came under psychiatric care and would be grilled by McGrath following visits to the psychiatrist to be reassured by petitioner that she had disclosed nothing to the psychiatrist regarding McGrath. As late as 1982 Walter Shanley grabbed her and kissed her without her consent at a postal service function and in March of 1985, at the installation of a new postmaster in Great Neck, Shanley returned to accuse her publicly of writing an anonymous letter that had caused trouble for every one. By this time both Shanley and McGrath had been disciplined and removed.

During the course of this period of sexual harassment an investigation was commenced by the Postal Inspection Service at the direction of the Postmaster General into allegations of sexual harassment in the Long Island Region of the Postal Service. Shanley and McGrath were specific targets of the investigation. Barbara Gerrish gave extensive information to two (2) postal service inspectors, John Brenenstuhl and Robert McDowall. Ironically, her cooperation with the postal inspection service sowed the seeds of the legal predicament she now finds herself in for two (2) reasons: Confidentiality was insisted upon by the inspectors causing Gerrish to speak to no one including Postal Service EEO officials and, some of those same officials worked directly for McGrath, a target of the investigation. Indeed, McGrath himself handled the EEO cases and supervised others who did likewise.

Several factors contributed to the alleged late filing of petitioner's EEO complaint: The need for confidentiality, her owned debilitated psychiatric condition and the misconduct of the EEO official in handling petitioner's complaint.

Petitioner was found to be completely disabled due to severe

mental depression caused by sexual harassment in the place of employment by the United States Department of Labor Office of Workers' Compensation Programs (OWCP). Her own treating psychiatrist, (Stephen Teich, M.D.), the psychiatrist for the Postal Service (Jed Goldhart, M.D.) and the Department of Labor psychiatrist (Warren King, M.D.) all concurred in their finding and petitioner continues to receive disability.

Based upon the findings made by the Postal Inspection Service, Shanley resigned rather than face disciplinary proceedings, McGrath was demoted six (6) positions and then resigned. Barbara Gerrish's essential allegations were never seriously controverted. Among the acts of misconduct by Postal EEO officials was that of Walter Sweeney, an EEO counselor. He came to petitioner house in September of 1985, made a remark about "getting laid" and refused to accept petitioner's written complaint of discrimination based on sex. He insisted that the complaint be changed to discrimination based on mental handicap and changed it in his own hand without plaintiff's consent. Her contention was that mental handicap was the result of sex discrimination. Although this complaint is repeatedly characterized as "late" the discrimination was ongoing, even to the extent of withholding pay from petitioner which she eventually received.

In 1987 petitioner initiated an action pursuant to 42 U.S.C. § 2000(e) *et seq.* By decision dated *November 10, 1987* the District Court (Glasser, J.) dismissed the complaint as untimely because of failure to file an EEO complaint within thirty (30) days. This dismissal was without prejudice, however, in order to give petitioner another thirty (30) day period within which to file an EEO complaint. Petitioner and her prior counsel were to be given the name of a person with Postal EEO with whom to file the new complaint. They were given such a name, Mr. E. Cedeno, by Assistant United States Attorney M. Lawrence Noyer, Jr.

Arrangements were to be made with Cedeno for purposes of filing a complaint. Mr. Cedeno never returned telephone calls from petitioner. This resulted in a letter of complaint from petitioner's prior counsel on April 22, 1988. Thereafter, prior counsel, by letter, asked that an EEO complaint be received by the Postal EEO. As a result of complaints by petitioner and her prior counsel, the matter was transferred from Cedeno to another EEO officer, Ms. Gerena. It should be noted that during this time the filing of the EEO complaint had been transferred from the Flushing Post Office, to the Hicksville, Post Office and then on May 1, 1988, was transferred once again to the New York City Post Office to which petitioner was finally directed for purposes of filing her complaint. Counsel's letters of April 27,1988, June 12,1988 and July 18,1988, complained of repeated delays and lack of response by postal EEO. A letter of apology of February 22, 1989, from P. Figueroa Rivera, a Postal EEO counselor for New York City referred to the inconvenience and delay caused to petitioner by Postal EEO. All of the foregoing indicates the difficulty petitioner herself had in taking action. This was compounded by the fact that she continued to be severely psychologically and emotionally disabled. The declarations of Postal Inspectors John Brenenstuhl and Robert McDowell support all of this.

The Postal EEO and ultimately EEOC once again found that petitioner had acted untimely in filing her second complaint. Petitioner then initiated a new Title VII action on or about January 5, 1990. On April 4, 1990, the Government filed a motion to dismiss or in the alternative for summary judgment. Petitioner's prior counsel advised the court about possible withdrawal on May 29, 1990, and thereafter moved to be relieved on the basis of inability to comply with Rule 11 of the Federal Rules of Civil Procedure and her motion to be relieved was granted on July 9, 1990. Petitioner, by letter dated July 9, 1990, requested additional time to respond to the Government's motion and the matter was adjourned. Petitioner sought court-assigned counsel because of

lack of funds but this application was denied on September 12, 1990.

On October 3, 1990, petitioner wrote to the district court judge (Glasser, J.) to explain that present counsel had agreed to represent her but that two (2) months was necessary to raise the necessary fees. A letter from Assistant United States Attorney Daniel DeVita to petitioner dated October 1, 1990, advised her that the next status conference was set for October 5, 1990, a subsequent letter from the Assistant United States Attorney Daniel DeVita to Judge Glasser confirmed adjournment of the status conference to November 9, 1990. A copy of this letter was sent to petitioner.

Present counsel, through mistake, did not appear at the status conference on November 9, 1990, and the court proceeded to rule from the bench on the merits, also assuming and deciding that petitioner had abandoned this action. Later in the same day, November 9,1990, present counsel realized this mistake and left a message on the court's answering machine and called the Assistant United States Attorney immediately following the intervening Veteran Day's weekend. The government declined to consent to vacatur of the court's decision and order. At the very moment of the decision on November 9, 1990, counsel had been reviewing this file in his office.

Thereafter a motion pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure was made.

This motion was argued on November 8, 1991. Decision was reserved and a memorandum and order denying the motion was entered on August 27, 1992. An appeal from that order to the United States Court of Appeals for the Second Circuit followed and by decision and order dated March 12, 1993, the judgment of the District Court was affirmed.

Petitioner continues to be severely psychiatrically and emotionally disabled as a result of what happened to her at the hands of her employer. She continues to receive disability through OWCP and continues to undergo psychiatric care. The situation in which she continues to find herself has rendered it extraordinarily difficult for her to proceed. She has been frequently unavailable and unable through no fault of her own to give meaningful assistance in important phrases of this case such as review of voluminous administrative and legal files, location of now retired Postal Service employees and in securing the cooperation of otherwise reluctant witnesses.

B. Prior Proceedings

Petitioner filed suit in April, 1987 in the United States District Court, Eastern District of New York. The complaint alleged a violation of 42 U.S.C. § 2000(e) *et seq.* ("Title VII") based on discrimination in the terms and conditions of employment because of petitioner's sex. That complaint was dismissed by decision of the District Court dated *November 10, 1987* without prejudice and is not sought to be reviewed herein.

Subsequently, in January, 1990 petitioner filed suit once again in the same District Court alleging the violation of 42 U.S.C. § 2000(e) *et seq.*, (" Title VII") based on the same acts alleged in the earlier complaint which had been dismissed without prejudice. The government filed a motion to dismiss pursuant to Rule 12(b)(6) and in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On November 9, 1990, the District Court granted that motion citing what appeared to be a default by petitioner but also ruling on the merits of the government's motion that petitioner's claim was time-barred for failure to meet the thirty (30) day filing requirement imposed by C.F.R. § 1613.214(a)(1)(i) pursuant to 42 U.S.C § 2000(e) *et seq.* and that, even if not time barred, principles of equitable tolling should not be applied under the facts of this case.

Petitioner filed a motion pursuant to Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure to vacate the decision and order of the District Court of November 9, 1990, on the grounds of mistake, inadvertence, surprise, excusable neglect or any other reasons justifying relief from the operation of the judgment. This was filed on or about September 4,1991. Argument was had on November 8, 1991, and decision was reserved.

A memorandum and order denying the motion was entered on August 27, 1 992.

An appeal from the order of August 27, 1992, was taken by petitioner to the United States Court of Appeals for the Second Circuit and argument was heard on March 12, 1993. By decision and order dated March 12, 1993, the judgment of the District Court was affirmed.

This petition for a writ of certiorari to this court follows that decision.

REASONS FOR GRANTING THE WRIT

There is one sole overriding reason for granting this writ: to prevent manifest injustice to the petitioner.

It is simply shocking to the conscience that the employer be permitted to escape responsibility for proven acts of the worst kind of *quid pro quo* and abusive work place harassment that have concededly left a once outstanding Postal Service employee thoroughly disabled because of mental depression caused by sex discrimination by high ranking officials of the employer. This injustice is compounded by the fact that one of petitioner's worst tormentors was a postmaster who handled EEO cases and reviewed others who performed similar work and petitioner was therefore told by postal inspectors that she should not tell anyone in the

Postal Service about the accusations. Her own mental state, as shown by affidavits submitted below, clearly rendered her unable to vigorously pursue her claim independently. Her second attempt to file was meet with a solid wall of evasion and resistance by Postal Service EEO officials. Their attitude is exemplified by EEO counselor Sweeney outrageous conduct, his refusal to accept the sex discrimination complaint, his willful alteration of the complaint and the subsequent refusal of the EEO officials to return calls, answer letters, respond to inquiries whether by petitioner, her lawyer or the postal inspectors themselves.

The courts below and the government have placed enormous weight on failure of newly retained counsel to appear at the status conference of November 9, 1990, and on the filing of the Rule 60 motion toward the end of permissible time period but still within it. The reasonableness of the period must be seen in context — a case whose factual history dated back to 1979, a petitioner in poor mental and emotional health whose close assistance was absolutely essential in explaining and reconstructing the long history of this case both legal, personal and administrative, securing the records of and the cooperation of witnesses and raising the issue of employer misconduct.

Indeed, the whole issue of employer misconduct pervades this entire case. Non-attendance in this case at the status conference was clearly serious — but how could anyone reasonably argue that, standing by itself it somehow operates to destroy petitioner's claim when weighed against the overwhelming merit of the substance of her case? If petitioner has not always been well served by counsel she has been far more aggrieved by the employer.

Should the Court deny this writ, it would be a hollow victory indeed for the government. The postal service would have dodged major liability because of procedural problems by the petitioner, and a truly aggrieved person would be left without a remedy which

she had diligently and actively pursued despite physical and emotional hardships, the fierce resistance of the Postal Service, her own financial difficulty and the inherently difficult task of one person taking on a large institution fiercely resistant to admitting responsibility for its own misconduct. A truly aggrieved person would be left without the remedy intended by law and overt discrimination and misconduct by an employer under Title VII would go undeterred and unpunished and a citizen would remain forever harmed.

Contrary to the District Court's opinion of November 9, 1990, petitioner never abandoned this claim nor showed any intent to do so. She asked for repeated adjournments to respond to the government's Rule 12(b)(1) and Rule 56 motion either to retain counsel, get court appointed counsel to represent her or to get time to put to gether enough money to take over the case late in the day. It is simply wrong for the employer to be permitted to block the path to justice and then be permitted to reap the benefits of its own misconduct. Any untimeliness on the part of the petitioner was occasioned either in whole or in part by the government's own misconduct and by petitioner own mental and emotional disability and the mistake made by petitioner's lawyer on November 9,1990, simply does not outweigh all the wrong committed by the employer and its agents against petitioner to which it has no defense on the merits.

This Court can certainly hold litigants and counsel to strict compliance with practice and procedure but there are occasions where it should not do so where manifest injustice would result. This is such an occasion.

While the doctrine of equitable tolling is not liberally applied, the scope within which the doctrine has been applied has widened in recent years. The doctrine of equitable tolling may now be applied to suits by employees against the federal government.

Irwin v. Veterans Administration, 111 S. Ct. 453 (1990). Among the circumstances which the court has considered in whether or not to apply principles of equitable tolling are active pursuit by petitioner of judicial remedies by timely filing a defective pleading, and trickery or misconduct by the employer which permits the time deadline to pass. *Irwin v. Veterans Administration,* 111 S. Ct. at 458 and cases cited thereat.

The actions of the employer in this case are replete with misconduct, trickery, stonewalling and deceit. The entire history of this dispute shows that petitioner has done all she could to press her claim. She was the victim of relentless sexual harassment and the object of active retaliation culminating in an almost complete mental and physical breakdown amply supported by medical findings and by the United States Department of Labor. She gave complete cooperation to the Postal Inspector's Service which investigated the facts of her claim and substantiated all of it. The acts of misconduct by Postal EEO personnel are set forth *supra.* The Postal Service should be estopped from claiming the benefit of the time limitation imposed by § 717 of Title VII, 42 U.S.C. § 2000(e-16) and its related regulation, 29 C.F.R. § 613-214(a)(1)(i) where it had ongoing actual notice of this claim and its underlying conduct and where, though its own misconduct permitted the time deadline to pass.

The court below should also have applied equitable tolling principles because of petitioner's mental incompetence as well. *Lopez v. Citibank N.A.,* 808 F.2d 905. The courts have acknowledged that there are occasional cases where the equities in favor of tolling are so compelling that deference to the agency's judgment would be wrong. *Johnson v. United States,* 758 F. Supp. 834 (1991), *New York v. Sullivan* ,906 F.2d 910 (2nd Cir. 1990).

The seriousness of Postal Service misconduct was set forth in declarations by the Postal Inspectors who found not only that the

allegations were substantiated but that they had pledged petitioner to confidentiality, had submitted a Postal Service Inspector Report to Postal Management for action and had specifically pointed out to

Figueroa Rivera, a Postal EEO official charged with investigating the complaint, their strict instructions to petitioner not to discuss this case and their expectation of a favorable resolution of Gerrish's sexual harassment complaint now that the investigation was over. Equally disturbing are the sworn statements by the inspector that Figueroa Rivera did not return phone calls or cooperate in any way. Her sole concern was the timeliness issue. The inspectors themselves were concerned about McGrath's influence over EEO personnel and so stated. (Declaration of John Brenenstuhl and Robert McDowall dated July 16,1991 and July 15,1991 respectively).

The courts below were simply wrong in not permitting petitioner to advance her claims and not proceed on the merits. Those who victimized petitioner will have had the last laugh. This surely cannot be the legislative policy behind 42 U.S.C. § 2000(e) (Title Vll) *et seq*. nor behind Rule 60(b)(1)(a) of the Federal Rules of Civil Procedure. The purpose of Title Vll is to prevent and provide a remedy for employment discrimination. The purpose of Rule 60 is to do justice and prevent injustice. There is only one correct decision which the Court can reach to give life to these purposes in this case and that is to grant this writ.

CONCLUSION

This case offers this Court an opportunity to consider and expound upon the purpose and scope of the doctrine of equitable tolling and estoppel as applicable to this situation where an employee has clearly and through official institutional action placed an employer on notice of acts of discrimination in employment under 42 U.S.C. § 2000(e) *et seq.*, the extent to which the employer's own misconduct may be considered on the issues of equitable tolling, estoppel and the scope and application of Rule 60(b)(i)(a) and the manifest injustice it is designed to prevent.

Respectfully submitted,

JAMES P. HARDING
Counsel of Record
COOPERMAN, HARDING
& MOORE
Attorneys for Petitioner
80-59 Lefferts Boulevard
Kew Gardens, New York 11415
(718) 805-1500

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 12, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY 90-cv-63 GLASSER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12 day of March one thousand nine hundred and ninety-three.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE DENNIS G. JACOBS

Circuit Judges,

HONORABLE JOHN F. KEENAN*

District Judge.

Docket No. 92-6226

BARBARA GERRISH,

Plaintiff-Appellant,

v.

ANTHONY M. FRANK, Postmaster General of the United States,

Defendant-Appellee.

---

* Honorable John F. Keenan, United States District Court for the Southern District of New York, sitting by designation.

Appendix A

ORDER

Barbara Gerrish appeals from an order entered on September 1, 1992 in the United States District Court for the Eastern District of New York (Glasser, J.) denying her motion under Fed. R. Civ. P. 60(b) for relief from the district court's November 9, 1990 order dismissing her second sexual harassment action with prejudice following her failure to respond or appear in court in response to defendant's motion to dismiss. Defendant successfully moved to dismiss plaintiff's complaint for plaintiff's failure to exhaust her administrative remedies in a timely manner.

Gerrish's action has been in the federal courts in one form or another for almost six years. It began in 1987 when she filed her first Title VII sexual harassment action concerning incidents alleged to have occurred at the latest in 1985 while she was employed in a supervisory position at the United States Postal Service. On November 10, 1987 her action was dismissed without prejudice for her failure to exhaust administrative remedies. She did not file an administrative complaint until April 1988; the Equal Employment Opportunity Commission eventually rejected her claims on December 7, 1988.

Gerrish filed a second federal court action on January 5, 1990. The district court, after having granted numerous continuances, dismissed her complaint with prejudice on November 9, 1990 for her failure timely to exhaust administrative remedies. Apparently by mistake, neither she nor her counsel appeared at the November 9 hearing. Eleven months later, on October 10, 1991 her counsel filed a motion to vacate the court's November 9 order under Fed. R. Civ. P. 60(b). In the meantime, Gerrish appealed the substance of the November 9 order *pro se* in this Court; despite having her appeal reinstated by this Court, following one dismissal, Gerrish

never filed a brief and her appeal was eventually dismissed. On September 1, 1991 the district court entered an order denying appellant's Rule 60(b) motion finding 1) that Gerrish's failure to appear at the November 9 hearing could not be excused by extenuating circumstances, and 2) that no basis supported excusing, under equitable tolling principles, her failure to exhaust administrative remedies in a timely manner and that her argument for extenuating circumstances based on that defense therefore lacked merit.

(1) The district court properly denied Gerrish's Rule 60(b) motion. Rule 60(b) provides in relevant part, "the court may relieve a party . . . from a final judgment, order or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . [or] any other reason justifying relief from the operation of the judgment." Relief under 60(b) arises "only upon a showing of exceptional circumstances" and the district court's decision on a Rule 60(b) motion is reviewed only for an abuse of discretion, *see Nemaizer v. Baker,* 793 F.2d 58, 61-62 (2d Cir. 1986). In particular, the negligence or oversight of counsel does not provide grounds for Rule 60(b) relief, *see id.* at 62, nor does an attorney's inability to manage his or her caseload furnish such grounds. *See United States v. Cirami,* 535 F.2d 736, 739 (2d Cir. 1976). Here, though Gerrish's counsel agreed to take the case in October 1990, he knew of the November 9 hearing date, failed to note it in his datebook, took no steps to seek an adjournment, and failed to seek a delay despite possessing all necessary resources to indicate the importance and date of the hearing. The district court unquestionably possessed adequate grounds to find that such circumstances do not merit Rule 60(b) relief. Such relief is also no substitute for a timely appeal, *Nemaizer,* 793 F.2d at 61, which in this case Gerrish failed to perfect despite ample opportunity.

(2) The district court also correctly found that there would be no basis to vacate the November 9 order based on Gerrish's allegations that she possessed a valid excuse for her failure to timely exhaust administrative remedies, namely that mental illness and depression prevented her timely filings. Judge Glasser properly found that although equitable tolling principles might have excused her failure to timely exhaust administrative remedies between 1985 and 1987, they could not excuse her failure to timely exhaust between the November 1987 dismissal, when the court informed her that she must seek administrative relief, and her delinquent filing of an administrative complaint in April 1988. For the above reasons, we find no abuse of discretion in the Court's denial of Gerrish's Rule 60(b) motion.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is affirmed.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/ Dennis G. Jacobs
Dennis G. Jacobs, U.S.C.J.

s/ John F. Keenan
John F. Keenan, U.S.D.J.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT DATED AUGUST 27, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER

CV-90-0063

BARBARA GERRISH,

Plaintiff,

-against-

ANTHONY FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Defendant.

GLASSER, United States District Judge:

Plaintiff Barbara Gerrish originally filed a Title VII sexual harassment action with this court in 1987. Because she had failed to seek the required administrative remedies, this court dismissed her claim on November 10, 1987. Gerrish thereafter initiated an EEOC proceeding on April 26, 1988 alleging the same 1985 acts of harassment; on December 7, the agency rejected her claims. She then filed this action on January 5, 1990. In the present application, Gerrish moves under Federal Rule of Civil Procedure 60(b)(1) for relief from this court's November 9, 1990 order dismissing the action with prejudice.

Appendix B

FACTS

On April 4, 1990, the government attorney filed a motion to dismiss the complaint, or for summary judgment in the alternative. A return date of April 20 was set, and the motion was adjourned on consent twice, to May 25 and then to June 8.

By letter dated May 29, plaintiff's counsel advised the court and parties that she was contemplating withdrawal (for reasons undisclosed), and requested an additional adjournment to July 6, which the court granted. Counsel subsequently moved for withdrawal on the grounds of inability to comply with Rule 11. In granting the request to withdraw (by order signed July 9), the court adjourned the defendant's motion once more (to August 10), and declared that plaintiff would be deemed to be acting *pro se* unless a notice of appearance was made by new counsel by July 20.

By letter dated July 9 (and filed July 26), plaintiff requested additional time to respond to defendant's motion. The court thereupon adjourned the hearing to September 14. Plaintiff also applied for appointment of counsel, which application was denied by order dated September 12.

Plaintiff failed to appear at the scheduled hearing on September 14. The court consequently rescheduled the hearing for October 5. That hearing was again adjourned to November 9, as confirmed by the government's October 4 letter to the court (referring to the hearing as a "status conference"), a copy of which was sent to plaintiff. Plaintiff failed to appear at the November 9 hearing, and the motion was deemed submitted.

Plaintiff notified the court — by letter dated October 3, but date-stamped on November 13 — that present counsel had agreed

to represent her on October 2. She also requested an extension of two months' time.

By order signed November 9, 1990, the court granted defendant's motion to dismiss with prejudice. The court observed that the same issues had been addressed in the November 1987 order dismissing plaintiff's first suit on these same claims. Moreover, the court's 1990 order responded to plaintiff's legal arguments in the alternative, noting that whether the 30-day limit (after the discriminatory acts) for filing an EEOC complaint is jurisdictional or not, plaintiff had failed to demonstrate any facts justifying equitable tolling.

Plaintiff's present counsel states that he first met plaintiff during an initial interview on October 2, 1990. Counsel stated that he did not at that time agree to take the case; rather, he indicated an inclination to do so, and discussed retainer arrangements with plaintiff, but did not make a final agreement. Counsel also admits that plaintiff advised him during this meeting of an impending "status conference" before the court, which counsel admits he failed to note in any of his personal or office diaries. Harding Affirmation ¶ 7.

Counsel received plaintiff's case file from preceding counsel on October 8. On October 22, counsel accepted the case, and over the course of the next several days devoted a number of hours to reading the file documents and consulting with plaintiff. Counsel spent the morning of November 9 — the date of the hearing — reviewing plaintiff's file, and received a phone call from plaintiff that afternoon inquiring about the scheduled court appearance.

Counsel alleges that he misunderstood the nature of the November 9 hearing, believing it to be a status conference on the

basis of the government's October 4 letter. Counsel also claims ignorance of any document other than that letter which characterizes the purpose of any of the September 14, October 5, or November 9 court dates. As noted above, however, the court file contains this court's clearly marked July 18 order adjourning argument on the motion to the new date of September 14.

Counsel for the defendant states that the first time he had any communication with plaintiff's counsel was by telephone on November 13. Plaintiff's counsel nowhere offers any statement to the contrary. In fact, Gerrish's attorney himself admits that he did not attempt to contact the court itself until his late afternoon call on November 9 to this court's deputy clerk; moreover, he did not actually speak to the clerk until November 13.

DISCUSSION

Rule 60(b) provides in relevant part that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . ."

It is well settled that the negligence or oversight of a party or party's counsel does not furnish a basis for relief under Rule 60(b)(1). *See Rodgers v. Wood,* 910 F.2d 444, 449 (7th Cir. 1990); *Pelican Prod. Corp. v. Marino,* 893 F.2d 1143, 1146 (10th Cir. 1990); *Lomas & Nettleton Co. v. Wisely,* 884 F.2d 965, 967-68 (7th Cir. 1989); *Lepkowski v. United States Dep't of Treasury,* 804 F.2d 1310, 1313 (D.C. Cir. 1986). The Second Circuit has

> consistently declined to relieve a client under subsection [60(b)] (1) of the "burdens of a final judgment entered against him due to the

> mistake or omission of his attorney by reason of the latter's ignorance of the law or other rules of court, or his inability to efficiently manage his caseload."

Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1986) (quoting *United States v. Cirami*, 535 F.2d 736, 739 (2d Cir. 1976)).

Thus, the failure of plaintiff's counsel to appear at the November 9, 1990 hearing provides no basis for relief. Had counsel indicated some extenuating circumstance, relief might be available. Here, where counsel knew of the court date, took no steps to seek an adjournment, and failed to appear despite the ready availability of sources (documents, the court, opposing counsel) able to indicate the importance of the hearing, Rule 60(b) has no application.

Plaintiff also argues that she has a meritorious defense to the motion to dismiss, and that this action should be reopened in order to allow her to assert that defense. Because this court finds the defense unpersuasive, this factor also fails to weigh in favor of vacating the order of dismissal.

Specifically, plaintiff urges that the court consider once again the argument that her delay in bringing within 30 days the required formal EEOC complaint — a delay spanning from the acts in mid-1985 to the EEOC complaint filed in April 1988 — may be excused under the doctrine of equitable tolling. A generous application of tolling, on the basis of plaintiff's mental condition, might conceivably allow an extension from 1985 up to April 1987, when (with assistance of counsel) she filed her first action before this court. Indeed, plaintiff might even argue that tolling could extend up to the time this court issued its November 1987 order dismissing

the complaint for failure to seek administrative remedies. However, given that plaintiff was represented by counsel in her first action, and given the unambiguous instruction of this court to seek administrative relief, this court can now find no justification for the delay of several months (November to April) before plaintiff filed her ultimately unsuccessful EEOC complaint.

Accordingly, the motion is denied.

SO ORDERED.

Dated: Brooklyn, New York
August 27th, 1992

s/ I. Leo Glasser
I. LEO GLASSER, U.S.D.J.

APPENDIX C — MEMORANDUM AND ORDER OF JUDGE GLASSER DATED NOVEMBER 9, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-90-0063

BARBARA GERRISH,

Plaintiff,

v.

ANTHONY M. FRANK, Postmaster General of the United States,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The plaintiff commenced this action alleging that the defendant discriminated against her because of her sex and subjected her to sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. The same events formed the basis for an action filed by her in 1987 which was subsequently dismissed for failure to exhaust administrative remedies.

Following the defendant's motion to dismiss, or, in the alternative, for summary judgment, the attorney then representing the plaintiff, moved to be relieved. In light of that, the defendant's motion was adjourned. On July 9, 1990, the motion to be relieved was granted in an order which recited that the plaintiff will be deemed to be acting *pro se* if a notice of appearance by new counsel was not filed on or before July 20, 1970. Responsive

papers on defendant's motion were to be filed by August 3, 1990 and oral argument was scheduled for August 10, 1990. The plaintiff thereafter requested additional time and on July 18, 1990 an order granting her request was issued, the filing of responsive papers was deferred until September 3, 1990 and oral argument scheduled for September 14, 1990. The plaintiff then sought to have counsel assigned from the Pro Bono Panel and in an order dated September 12, 1990 her application was denied for the reason that her financial resources did not justify such appointment. On September 14, 1990, neither the plaintiff nor an attorney appeared and the defendant's motion was adjourned again until October 5, 1990, and on that date, again adjourned until November 9, 1990 when neither plaintiff nor an attorney on her behalf appeared. Continued adjournments no longer seem appropriate and the defendant's motion will be addressed. That motion seeks a dismissal of the complaint for failing to allege that administrative remedies were exhausted and also because the plaintiff failed to bring the discriminatory acts of which she complains to the attention of the Equal Employment Opportunity ("EEO") counselor within thirty days after the alleged acts as she was required to do by 29 CFR § 1613.214(a)(1)(i).

The legal considerations relevant to this motion were thoroughly considered and discussed in the Memorandum and Order of this court dated November 10, 1987, familiarity with which is assumed. The court sees no need to resolve the question as to whether the thirty day limit prescribed by the CFR is jurisdictional or a statute of limitations. The circuits are divided on that issue. *See, e.g., Kontos v. United States Department of Labor,* 826 F.2d 573 (7th Cir. 1987) (jurisdictional) and *Ross v. United States Postal Service,* 814 F.2d 616 (11th Cir. 1987) (statute of limitations). If jurisdictional, the plaintiff has not sustained the burden of establishing that pre-requisite. If statute of limitations,

the plaintiff has presented no facts which would justify invoking the principle of equitable tolling. *See Martinez v. Orr,* 738 F.2d 1107, 1110 (10th Cir. 1984).

The defendant's motion is, accordingly, granted and the complaint is dismissed, with prejudice.

SO ORDERED.

s/ illegible
United States District Judge

Dated: Brooklyn, New York
November 9, 1990